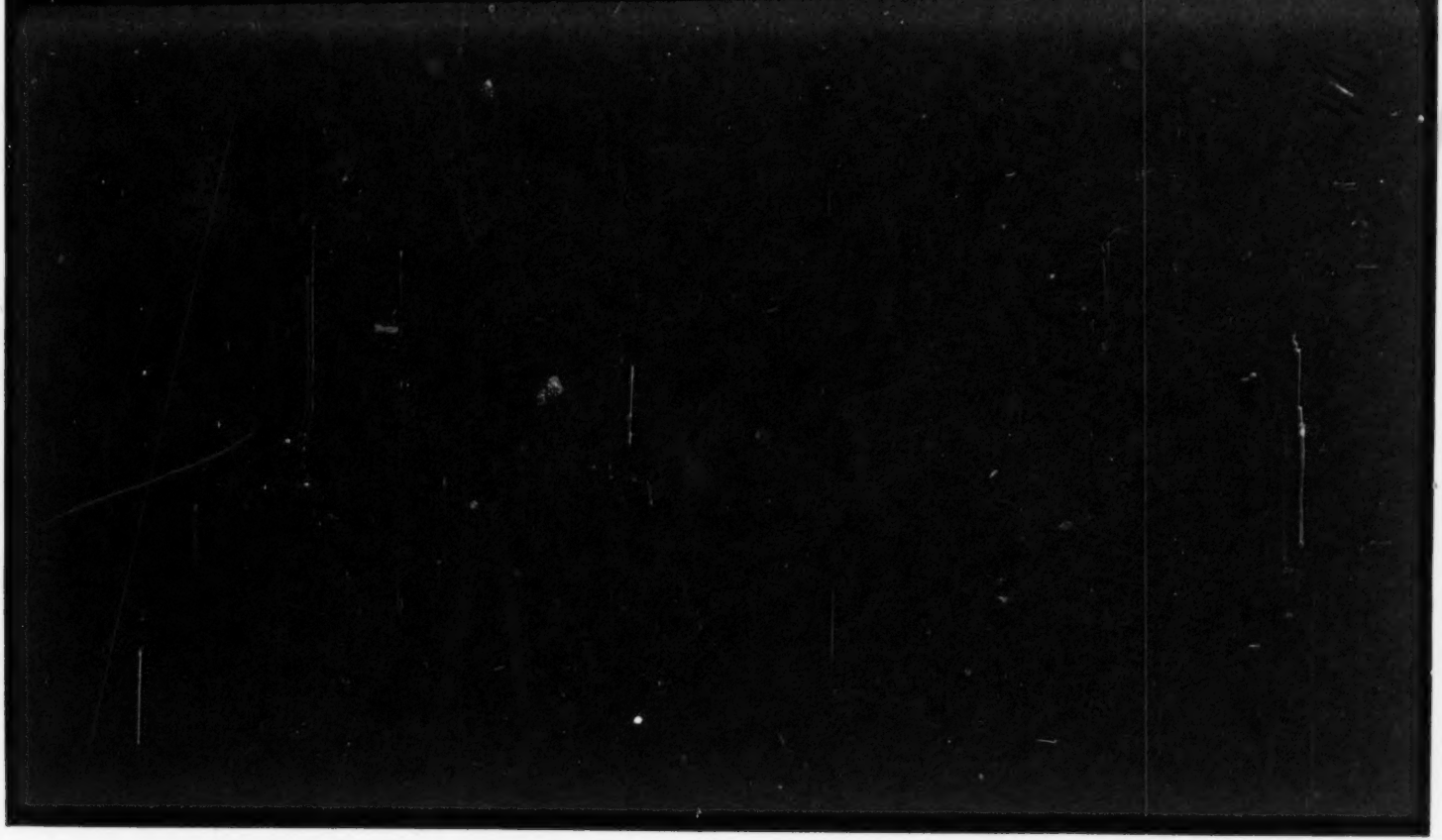

SUBJECT INDEX

PAGE

Opinion below 1

Jurisdiction 1

Question presented for review 2

Statement of the case 2

Argument 7

No substantial federal question is raised by the petition. Due process does not require the automatic disqualification of a judge as biased or prejudiced simply because the judge has committed an error in the prior discharge of his official duties 7

Conclusion 10

Appendices:

Appendix A. California Code of Civil Procedure, Section 170 ..... App. p. 1

Appendix B. Affidavit and answer of Judge in response to motion to disqualify ..... App. p. 7

Appendix C. Findings and order in re claimed disqualification of trial judge ..... App. p. 14

TABLE OF AUTHORITIES CITED

Cases

	PAGE
American Steel Barrel Co., Ex parte, 230 U. S. 35	9
Beecher v. Federal Land Bank, 153 F. 2d 987, cert. den. 328 U. S. 871	9
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673	6
Buchman, Estate of, 123 Cal. App. 2d 546, 267 P. 2d 73	1, 4
Buchman, Estate of, 132 A. C. A. 92, 281 P. 2d 608	1, 5, 8
Drivers Union v. Meadowmoor Co., 312 U. S. 287	8
Evans v. Superior Court, 107 Cal. App. 372, 290 Pac. 662	3
Glasser v. United States, 315 U. S. 60	7
Kennedy, Estate of, 87 Cal. App. 2d 795, 197 P. 2d 844	2
Kreling v. Superior Court, 25 Cal. 2d 305, 153 P. 2d 734	9
Labor Board v. Donnelly Co., 330 U. S. 219	9
Littleton v. DeLashmutt, 188 F. 2d 973, cert. den. 342 U. S. 897	9
Merchants Liability Co. v. Smart, 267 U. S. 126	8
Murdock v. Mayor of Memphis, 20 Wall. 590	6
Offcut v. United States, 99 L. Ed. (Adv.) 7	5, 7
Patton v. United States, 281 U. S. 276	7
Pennekamp v. Florida, 328 U. S. 331	8
People v. Adamson, 332 U. S. 46	9
Quercia v. United States, 315 U. S. 60	7
Reetz v. Michigan, 188 U. S. 505	8
Ryan v. Welte, 87 Cal. App. 2d 888, 198 P. 2d 351	9
St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 281	6, 8

Statutes

California Code of Civil Procedure, Sec. 170	2
California Code of Civil Procedure, Sec. 170(5)	2
California Probate Code, Secs. 520-526	4
United States Code, Title 28, Sec. 1257(3)	1

IN THE

Supreme Court of the United States

October Term, 1955

No. .....

HAMLIN K. BUCHMAN,

Petitioner,

vs.

CLAIRE MORSE,

Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California.

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

Opinion Below.

The opinion below is reported in *Estate of Buchman,* 132 A. C. A. 92, 281 P. 2d 608. The California Supreme Court denied a hearing. The opinion in a prior proceeding in the same estate, *Estate of Buchman,* 123 Cal. App. 2d 546, 267 P. 2d 73, has long been final and is not sought to be reviewed here. Both opinions are Appendices to the Petition.

Jurisdiction.

The alleged jurisdictional requisite as set forth in the Petition is 28 U. S. C. 1257(3).

Question Presented for Review.

Only a single, simple question is presented: Whether a litigant is denied due process if required to try his case before a judge who in a prior and independent proceeding in the same estate had had an erroneous conception of his duty, but who prior to the proceeding here challenged, was specifically found by another judge, and in accordance with the California statutes, not to be biased or prejudiced against petitioner.

Statement of the Case.

The relevant facts and the pertinent statutes are these:

(1) In California in the administration of estates of decedents, "Each act of the court is an *independent* step in the administration."[1]

Estate of Kennedy, 87 Cal. App. 2d 795, 798, 197 P. 2d 844, and authorities there cited.

(2) The competency of a judge to sit may be challenged by a party. California Code of Civil Procedure, Section 170, is the governing statute and is reproduced in full as Appendix A hereof. Under the statute, a judge may be disqualified by reason of bias or prejudice. A party's challenge to a judge is initiated by filing an affidavit setting forth the fact or facts constituting the ground of the disqualification. It must be "made to appear probable that, by reason of bias or prejudice of such justice or judge a fair and impartial trial can not be had before him." (Cal. Code Civ. Proc., Sec. 170(5).) The challenged judge may file an affidavit denying bias or prejudice.

---

[1]Emphasis has been added by respondent to quotations unless otherwise noted.

If the parties do not agree upon another judge to determine the issue thus created, the Chairman of the Judicial Council (who is the Chief Justice of the State's highest Court, the Supreme Court) designates another judge to make the determination. The determination so made though not itself an appealable order is subject to attack by peremptory writ (*Evans v. Superior Court,* 107 Cal. App. 372, 290 Pac. 662) and is subject to review on appeal from a subsequent appealable order or judgment. The determination in the instant case was reviewed on appeal in the opinion here challenged, 132 A. C. A. 92.

(3) On March 11, 1953, various petitions of respondent herein, various petitions for attorney fees and extraordinary fees, and the settlement of and objection to the accounts of the administrator and executor were on the calendar of the Probate Department of the Superior Court of Los Angeles County, California. These were all independent matters. The petitions of respondent included a petition to remove the executor, and a Petition for Partial Distribution. As the opinion of the District Court of Appeal states:

> "It was stipulated that the matters might be heard together and 'that evidence competent in any of the matters may be received and at the end the court will sort it out and make a separate ruling in each matter.' There was no stipulation that these matters might be consolidated nor was any order made that they be consolidated. Thereafter, Judge Condee [the trial judge] stated that his initial concern was with regard to appellant's competency to continue as executor." (132 A. C. A. 92, 100.)

(4) Under California law an executor may be *suspended* without taking any evidence. He may not be summarily *removed*. (Cal. Prob. Code, Secs. 520-526; *Estate of Buchman,* 123 Cal. App. 2d 546.) During the hearing of the several matters the trial judge, noting the conduct of the executor, *removed* him from office instead of *suspending* him. The trial judge made findings of fact and a formal order thereon. These are reproduced on pages 319 and 330-340 of the Clerk's Transcript. The executor immediately appealed. A year later the District Court of Appeal reversed, holding that the *removal* under the circumstances was without supporting evidence and constituted a denial of due process. The Court stated that, "The judge's conception of his duty was entirely erroneous." (*Estate of Buchman,* 123 Cal. App. 2d 546, 560.) This judgment and opinion has long been final and is not in issue here.

(5) Meanwhile, the executor filed an affidavit charging the trial judge with bias and prejudice. The affidavit merely reproduced parts of the Reporter's Transcript of the hearing at which the trial judge had removed petitioner and included his opinion that the trial judge was biased and prejudiced against him. [Clk. Tr. pp. 345-355.] The trial judge filed a counter affidavit denying the charge. [Clk. Tr. pp. 368-373.] *Inter alia* he stated that prior to the assignment of the matter to him, "he knew nothing about it nor did he know or had he ever heard of either Hamlin K. Buchman or Claire Morse"; that he believed the statute required him to suspend or remove Mr. Buchman as executor under the circumstances as he saw them; and that in removing the executor he was motivated by a desire to preserve

the estate, and not by bias or prejudice against the executor. His affidavit is set forth in full in Appendix B hereof. The Presiding Judge of the Superior Court of Los Angeles County, under designation by the Chairman of the Judicial Council, found that the trial judge was neither biased nor prejudiced against petitioner. [Clk. Tr. pp. 374-375.] These findings are set forth in Appendix C hereof.[2]

(6) Thereupon, the matters other than the petition for the executor's removal proceeded to trial-completion. Judgment was adverse to petitioner in all such matters. Once more he appealed. Except for an unimportant item relating to his account, the judgment against him was affirmed in all particulars. (*Estate of Buchman,* 132 A. C. A. 92.) This is the judgment here challenged.

(7) Of course, no federal or constitutional question is raised by the substantive problem of construction of the property settlement agreement involved in this judg-

---

[2]In this connection we point out that the trial judge never "expressed a personal interest in the case" (Pet. p. 3) and did not "hold the case to himself" (Pet. p. 5). Except for petitioner's grossly tardy motion for a jury trial, petitioner's procedural motions to remove the case from Judge Condee were denied by another judge. (See 132 A. C. A. 92, 101-102.) It is also untrue that in the challenged proceeding "the trial judge considered issues not made by any pleadings, failed to find on the issue of estoppel" (Pet. p. 6). Petitioner's present counsel, "counsel of his choice" (Pet. p. 9), in fact was his counsel in all proceedings mentioned herein, was permitted formally to be substituted into the case prior to the challenged proceedings, and represented him and no one else throughout the challenged proceeding. (See 132 A. C. A. 92, 101.) Finally, in no sense was there any "interest of the judge in the case" (Pet. p. 12) within the meaning of cases like *Offcutt v. United States,* 99 L. Ed. (Adv.) 7.

ment, nor by any of the rulings rejecting certain of petitioner's evidence as irrelevant to that problem.[3]

Murdock v. Mayor of Memphis, 20 Wall. 590;

St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 281, 291-292;

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 680-681.

On these matters petitioner has had full opportunity to present his case and has also exercised his right of appeal. What is important is that on appeal petitioner sought and obtained review of the decision of the Presiding Judge that the trial judge was not biased or prejudiced. The District Court of Appeal held that such determination was supported by the evidence. (132 A. C. A. 92, 114-115.) That Court also pointed out that however erroneous the trial judge might have been in *removing* petitioner, instead of *suspending* him, such erroneous judgment was not any evidence of bias or prejudice and did not compel such a finding. By denying a hearing to petitioner, the California Supreme Court on May 25, 1955, in effect affirmed the decision of the District Court of Appeal.

We submit that no substantial federal question is raised by the Petition for Certiorari and that it is frivolous.

---

[3]These matters and the California law thereon are all discussed at length in 132 A. C. A. 92, where the determinations of the trial judge are affirmed. Most of the Petition is in reality a challenge of the correctness of these determinations. *E. g.,* Petition, page 12: "We can see no less than that, the affirmative defense of appellant was denied existence, that the evidence in support was rejected, that the judge ignored all the material evidence, and rejected necessary conclusions of law." This is not an argument that petitioner was denied due process but simply that the trial court erred.

ARGUMENT.

No Substantial Federal Question Is Raised by the Petition. Due Process Does Not Require the Automatic Disqualification of a Judge as Biased or Prejudiced Simply Because the Judge Has Committed an Error in the Prior Discharge of His Official Duties.

Petitioner invoked the California statutory proceeding to determine the qualification of the trial judge to hear the instant matter. There is no claim that the procedure involved in this determination was unfair or unconstitutional in any way.

Petitioner's authorities such as *Glasser v. United States,* 315 U. S. 60, where the trial judge deprived a defendant of effective counsel in a criminal prosecution, and *Offcutt v. United States,* 99 L. Ed. (Adv.) 7, a contempt proceeding, are, therefore, irrelevant.[4]

Irrelevent also are the various general rules with which the Petition is sprinkled, such as "Justice must not only be fair, but have all the appearance of fairness," and, "An impartial judge and a fair tribunal are of the very essence of due process of law." (Pet. pp. 8, 9.) These

---

[4]As pointed out above in footnote 2, petitioner's right to "counsel of his own choice" is not in issue here. There was absolutely no "personal embroilment" or "continuous wrangle" between the trial judge and petitioner's counsel, as in the *Offcutt* case, nor were there any rulings by the trial judge on any matters in which he or counsel were personally involved. Indeed, petitioner has not even attempted to point to any such matters in the record. *Quercia v. United States,* 315 U. S. 60; *Patton v. United States,* 281 U. S. 276, and the opinions of other courts cited by petitioner are even farther afield.

rules are, of course, conceded. None has been infringed in this case. As the District Court of Appeal stated:

> "Since the matters were regularly before a judge who was not disqualified there was no legal reason for a transfer to another court." (132 A. C. A. 92, 115.)

In reality petitioner's claim that the judgment here challenged was "fatally infected" rests on two erroneous premises: (1) that the *finding of fact* by the Presiding Judge that the trial judge was not biased or prejudiced against petitioner should be disregarded; and (2) that because the trial judge had erroneously removed petitioner in a prior proceeding he was *as a matter of law* biased and prejudiced against petitioner.

The finding of fact was reviewed and affirmed by the California appellate courts. (*Estate of Buchman,* 132 A. C. A. 92.) Even though "due process" is claimed to be ultimately involved, this Court does not sit to review such determinations of fact, especially where evidence in support of the finding was so overwhelming.

Pennekamp v. Florida, 328 U. S. 331, 345;

Drivers Union v. Meadowmoor Co., 312 U. S. 287, 294;

St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 281, 287;

Merchants Liability Co. v. Smart, 267 U. S. 126, 131-132.

Indeed, due process does not even require appellate review of a finding of fact, though petitioner has had such review.

Reetz v. Michigan, 188 U. S. 505, 508.

As a matter of law it has long been held by both state and federal courts that neither an erroneous opinion on the law relating to the proceedings nor expressions of opinion uttered by a judge in what he conceives to be a discharge of his official duties are any evidence of bias or prejudice against a litigant. Representative cases are:

Littleton v. DeLashmutt, 188 F. 2d 973, 975 (C. C. A. 4, 1951), cert. den. 342 U. S. 897;

Beecher v. Federal Land Bank, 153 F. 2d 987, 988 (C. C. A. 9, 1945), cert. den. 328 U. S. 871;

Kreling v. Superior Court, 25 Cal. 2d 305, 310-311, 153 P. 2d 734;

Ryan v. Welte, 87 Cal. App. 2d 888, 893, 198 P. 2d 351.

Unless it can be said that such a rule does violence to the teachings of human experience, there is no violation of due process if a state court applies it.

People v. Adamson, 332 U. S. 46, 55-58.

Indeed, this Court has itself approved the rule:

Ex parte Am. Steel Barrel Co., 230 U. S. 35, 43-44;

Labor Board v. Donnelly Co., 330 U. S. 219, 236.

There is no basis for petitioner to assert to this Court that the proceeding was heard by a judge who was biased and prejudiced against him and that therefore he was denied due process. For petitioner to prevail here would require not only a renunciation of the above rule but the promulgation of an absurdity: that an erroneous opinion on the law relating to a prior proceeding auto-

matically disqualifies a judge because of bias or prejudice. This is obvious nonsense.

Conclusion.

Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Dated, Los Angeles, California, September 9, 1955.

Respectfully submitted,

GEORGE I. DEVOR,

Attorney for Respondent.

JERRY GIESLER,

Of Counsel.

APPENDIX A.

CALIFORNIA CODE OF CIVIL PROCEDURE, SECTION 170.

170. WHEN JUDGE OR JUSTICE IS DISQUALIFIED. No justice or judge shall sit or act as such in any action or proceeding:

1. To which he is a party; or in which he is interested other than as a holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation;

2. In which he is interested as a holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation;

3. When he is related to either party, or to an officer of a corporation, which is a party, or to an attorney, counsel, or agent of either party, by consanguinity or affinity within the third degree computed according to the rules of law, or when he is indebted, through money borrowed as a loan, to either party, or to an attorney, counsel or partner of either party, or when he is so indebted to an officer of a corporation or unincorporated association which is a party; provided, however, that if the parties appearing in the action and not then in default, or the petitioner in any probate proceeding, or the executor, or administrator of the estate, or the guardian of the minor or incompetent person, or the commissioner, or the referee, or the attorney for any of the above named, or the party or his attorney in all other or special proceedings, shall sign and file in the action or matter, a stipulation in writing waiving the disqualification mentioned

in this subdivision or in subdivisions 2 or 4 hereof, the judge or court may proceed with the trial or hearing and the performance of all other duties connected therewith with the same legal effect as if no such disqualification existed;

4. When, in the action or proceeding, or in any previous action or proceeding involving any of the same issues, he has been attorney or counsel for any party; or when he has given advice to any party upon any matter involved in the action or proceeding; or when he has been retained or employed as attorney or counsel for any party within two years prior to the commencement of the action or proceeding;

5. When it is made to appear probable that, by reason of bias or prejudice of such justice or judge a fair and impartial trial cannot be had before him.

Whenever a judge or justice shall have knowledge of any fact or facts, which, under the provisions of this section, disqualify him to sit or act as such in any action or proceeding pending before him, it shall be his duty to declare the same in open court and cause a memorandum thereof to be entered in the minutes or docket. It shall thereupon be the duty of the clerk, or the judge if there be no clerk, to transmit forthwith a copy of such memorandum to each party, or his attorney, who shall have appeared in such action or proceeding, except such party or parties as shall be present in person or by attorney when the declaration shall be made.

In justice courts when, before the trial, either party makes and files an affidavit that he believes that he cannot have a fair and impartial trial before the judge before which the action is pending, by reason of the

interest, prejudice or bias of the judge, the court may order the transfer of the action, and the provisions of Section 398 of this code shall apply to such transfer.

Whenever a judge of a court of record who shall be disqualified under the provisions of this section, to sit or act as such in any action or proceeding pending before him, neglects or fails to declare his disqualification in the manner hereinbefore provided, any party to such action or proceeding who has appeared therein may present to the court and file with the clerk a written statement objecting to the hearing of such matter or the trial of any issue of fact or law in such action or proceeding before such judge, and setting forth the fact or facts constituting the ground of the disqualification of such judge.

Within five days after the presentation and filing of any such statement, the judge alleged therein to be disqualified may file with the clerk his consent in writing that the action or proceeding be tried before another judge, or may file with the clerk his written answer admitting or denying any or all of the allegations contained in such statement and setting forth any additional fact or facts material or relevant to the question of his disqualifications. The clerk shall forthwith transmit a copy of the judge's consent or answer to each party or his attorney who shall have appeared in such action or proceeding. Every such statement and every such answer shall be verified by oath in the manner prescribed by Section 446 of this code for the verification of pleadings. The statement of a party objecting to the judge on the ground of his disqualification, shall be presented at the earliest practicable opportunity, after his appearance and discovery of the facts constituting the ground of the judge's disqualification, and in any event before the commence-

ment of the hearing of any issue of fact in the action or proceeding before such judge.

No judge of a court of record, who shall deny his disqualification, shall hear or pass upon the question of his own disqualification; but in every such case, the question of the judge's disqualification shall be heard and determined by some other judge agreed upon by the parties who shall have appeared in the action or proceeding, or, in the event of their failing to agree, by a judge requested to act by the chairman of the Judicial Council, and, if the parties fail to agree upon a judge to determine the question of the disqualification, within five days after the expiration of the time allowed herein for the judge to answer, it shall be the duty of the clerk then to notify the chairman of the Judicial Council of that fact; and it shall be the duty of the chairman of the Judicial Council forthwith, upon receipt of notice from the clerk, to request some other judge, not disqualified, to hear and determine the question.

If such judge admits his disqualifications, or files his written consent that the action or proceeding be tried before another judge, or fails to file his answer within the five days herein allowed, or if it shall be determined after hearing that he is disqualified, the action or proceeding shall be heard and determined by another judge or justice not disqualified, who shall be agreed upon by the parties, or, in the event of their failing to agree, appointed by the chairman of the Judicial Council; provided, however, that when there are two or more judges of the same

court, one of whom is disqualified, the action or proceeding may be transferred to a judge who is not disqualified.

A judge who is disqualified may, notwithstanding his disqualification, request another judge, who has been agreed upon by the parties, to sit and act in his place.

6. In an action or proceeding brought in any court by or against the Reclamation Board of the State of California, or any irrigation, reclamation, levee, swamp land or drainage district, or any public agency, or trustee, officer or employee thereof, affecting or relating to any real property, or an easement or right of way, levee, embankment, canal, or any work provided for or approved by the Reclamation Board of the State of California, a judge of the superior court of the county, or a judge of the municipal court or justice court of the judicial district, in which such real property, or any part thereof, or such easement or right of way, levee embankment, canal or work, or any part thereof is situated shall be disqualified to sit or act, and such action shall be heard and tried by some other judge requested to sit therein by the chairman of the Judicial Council, unless the parties to the action shall sign and file in the action or proceeding a stipulation in writing, waiving the disqualification in this subdivision of this section provided, in which case such judge may proceed with the trial or hearing with the same legal effect as if no such legal disqualification existed. If, however, the parties to the action shall sign and file a stipulation agreeing upon some other judge to sit or act in place of

the judge disqualified under the provisions of this subdivision, the judge agreed upon shall be called by the judge so disqualified to hear and try such action or proceeding; provided, that nothing herein contained shall be construed as preventing the judge of the superior court of such county, or of the municipal court of such judicial district, from issuing a temporary injunction or restraining order, which shall, if granted, remain in force until vacated or modified by the judge designated as herein provided.

7. Notwithstanding anything contained in subdivision 6 of this section, a judge of the superior court or a judge of the municipal court or justice court of the judicial district, in which any real property is located, shall not be disqualified to hear or determine any matter in which the opposing party shall have failed to appear within the time allowed by law, or as to such of the opposing parties who shall have failed to appear within the time allowed by law, and as to which matter or parties the same shall constitute purely a default hearing; provided, that nothing in this section contained shall be construed as preventing the judge of the superior court of such county, or of the municipal court of such judicial district, from issuing an order for immediate possession in proceedings in eminent domain.

Nothing in this section contained shall affect a party's right to a change of the place of trial in the cases provided for in Title 4, Part 2 of this code.

APPENDIX B.

In the Superior Court of the State of California, in and for the County of Los Angeles.

In the Matter of the Estate of Harry G. Buchman, also known as H. G. Buchman, Deceased. No. 321,766.

AFFIDAVIT AND ANSWER OF JUDGE IN RESPONSE TO MOTION TO DISQUALIFY.

State of California, County of Los Angeles, ss.

NEWCOMB CONDEE, being first duly sworn, deposes and says:

That he is one of the Judges of the above-entitled Court; that he is now duly assigned to Department 5 thereof and was so assigned on Wednesday, March 11, 1953. That the above-entitled matter was assigned to him by the Presiding Judge of the Probate Department of the Court; that prior to the time that the matter was so assigned to him, he knew nothing about it nor did he know or had he ever heard of either Hamlin K. Buchman or Claire Morse.

Sometime about 9:30 A.M. of said 11th day of March, 1953, the parties and their various attorneys entered the courtroom in which affiant presides. At that time affiant was engaged as a Judge in disposing of numerous short matters regularly on the calendar. Eventually, affiant reached and called the above-entitled matter.

There is attached hereto and made a part of this Affidavit a complete copy of the official reporter's transcript of what occurred. Said copy of said transcript is incorporated herein as fully as if set forth in *haec verba*. Reference is hereby made to pages 2 to 4 thereof. It

will be observed that there were various petitions on the calendar affiecting the above-entitled matter and that counsel stipulated that they should all be tried together and that evidence competent in any one of them might be received, and at the end of the hearing the Court should make a separate ruling in each matter. (See: Kreling v. Superior Court, 25 Cal. 2d 305.) Among the matters then before the Court for disposition was a petition filed by Claire Morse for the removal of Hamlin K. Buchman as executor of the last Will and Testament of the above-named decedent.

As indicated by the reporter's transcript, page 4, affiant announced a short recess and repaired to his Chambers, there disposing of other business before him. The door of the Chambers leading into the courtroom was closed. Nonetheless, affiant heard unusual noises and shouting. The clerk entered the Chambers and reported to affiant that Mr. Buchman was acting strangely, that is to say, he had taken up a place in a corner of the courtroom where he stood standing and shouting. Affiant dismissed the clerk and did nothing about the matter. Affiant continued to work in disposing of the court's business.

Perhaps 10 or 15 minutes thereafter elapsed when the clerk again entered the Chambers and stated that Mr. Buchman was continuing to act strangely and that the efforts of his counsel, Judge Pacht, to quiet him had been unavailing. He then stated that Judge Pacht and other counsel desired to confer with affiant. Affiant directed that they be shown in.

Thereupon, Messrs. Isaac Pacht, Jerry Pacht, Jerry Giesler and George I. Devor entered the court's Chambers. Parenthetically, it might be observed that Mr. Buchman, having taken up his place in the corner just outside the

Judge's Chambers, was visible when the door was opened on the occasions aforesaid, and affiant observed him standing in the said corner with his hands folded behind his back, prisoner fashion.

On entering the Chambers, Judge Pacht inquired of affiant whether affiant was aware of what was going on in the courtroom, and affiant answered to the effect that the clerk had reported that Mr. Buchman was acting peculiarly. Judge Pacht then said in subtsance and effect that he had a duty to his client, but that he had also a duty to the court and under the circumstances, he felt that he was bound to make certain disclosures to the court to the end that a continuance of the matters on the calendar might be had. Under questioning by affiant, Judge Pacht stated that his client had been suffering from some mental illness and was then under the care of a psychiatrist; that on some days the client, Mr. Buchman, seemed perfectly rational and normal and at other times, not so.

Upon being so informed affiant stated that he thought there was a code section covering the situation which made it mandatory upon affiant as a Judge to suspend or remove Mr. Buchman as executor. Affiant then read aloud from Section 521 of the Probate Code which reads in part as follows:

> "Whenever a Judge of the court has reason to believe from his own knowledge, *or from credible information* that any executor . . . has wasted, embezzled or mismanaged or is about to waste, or embezzle, the property of the estate committed to his charge, or has committed, or is about to commit a fraud upon the estate *or is incompetent to act* . . .

or has wrongfully neglected the estate . . . he . . . may suspend his powers until the matter is investigated."

Judge Pacht, in response to a question put to him by affiant declined to state whether in his opinion Mr. Buchman was able to continue as executor, having regard to his mental condition. He said that he preferred to have the court form its own conclusions. Messrs. Devor and Giesler stated that they opposed a continuance. The various attorneys left the Chambers of affiant and affiant took the Bench. What happened in open Court is reflected in pages 4 to 27 of the reporter's transcript. As noted therein the court recessed until 2 o'clock. Upon the resumption of court at 2 o'clock, Mr. Buchman immediately addressed affiant. First he stood at counsel table and later mounted the witness box. He talked continuously. His talk was disjointed and unconnected. His eyes were glassy. He gesticulated and grimaced. It became perfectly apparent to affiant as it had to the other persons in the courtroom, that Mr. Buchman was suffering from some severe mental illness and it became perfectly apparent to affiant that he should be removed as executor in order that the estate of the decedent should be preserved for those interested therein. The proceedings in the afternoon of said March 11, 1953, are correctly set forth in the transcript, page 28 *et seq.*

Affiant's attitude toward Mr. Buchman was one of sympathetic consideration, and having in mind that he might be convinced of his own evident incapacity by con-

sulting a court appointed psychiatrist and neurologist, and having in mind the request of Mr. Buchman that the court appoint such physician, such physician was appointed by affiant. The various matters were continued from Wednesday until Friday, the 13th, to enable Mr. Buchman to have his examination. It was later reported to the court by Dr. McNeil, the court-appointed psychiatrist, that Mr. Buchman had appeared at his office with a reporter and that Mr. Buchman made it a condition of his examination that the reporter be present during the course of the examination; that the physician declined to make any examination under such conditions.

Affiant, as such Judge, thereupon entered an order removing Mr. Buchman as executor. A copy of the Findings of Fact and Conclusions of Law is attached thereto and incorporated herein as fully as if set forth herein *in haec verba.*

Affiant makes this Affidavit because of the statement of the Supreme Court in McEwen v. Occidental Life Insurance Company, 172 Cal. 6, 10, that it "(is) his duty, if he (can) do so, to negative the allegations of prejudice under oath in the form of an affidavit, reciting his mental attitude."

Affiant denies that he now is or ever was biased and prejudiced or biased or prejudiced against Mr. Buchman. He further denies that by reason of any bias or prejudice Mr. Buchman cannot have a fair and impartial trial before affiant.

Affiant is aware of the law that the matter of his disqualification is to be determined upon the affidavit of Mr. Buchman and this answer, and nothing else. (Bixby v. Hotchkiss, 72 Cal. App. 2d 368, 374.) For that reason, he calls specific attention to the fact that the court by examining the file and taking judicial notice of the contents thereof, as he is required by law to do (Muller v. Martin, 116 A. C. A. 498) found that it was true that Mr. Buchman had neglected the estate of which he was administrator by failing to file an inventory and appraisement within three months after the date of his appointment and that such conduct is, itself, sufficient ground to warrant removal (See: Estate of Richardson, 74 Cal. App. 2d 350).

At the time of the hearing it appeared to the court that, having regard to the size of the estate, approximately $570,000.00, a large amount of cash on hand, approximately $58,000.00, the operation of two large apartment houses forming part of the estate, that the property, itself, would be preserved and the interests of those interested in the estate would be conserved by Mr. Buchman's removal. Such order for removal was made for those reasons and those reasons alone, and without bias or prejudice against Mr. Buchman. It is perfectly true that during the course of the proceedings, having regard to all of the facts including Mr. Buchman's mental state, that affiant suggested that he resign. Such suggestions were made for the purpose of preserving his rights, as well as the rights of others interested in the estate.

Affiant entertained serious doubts as to the legal sufficiency of the affidavit of Mr. Buchman, but preferred not to strike it, even though it is or might be legally insufficient. (People v. McCullogh, 100 Cal. App. 2d 101, 109-110.) Affiant does not believe that he committed error in removing Mr. Buchman, but if he did, such error is not bias or prejudice against him (Kreling v. Superior Court, 25 Cal. 2d 305, 312), and is reviewable on appeal. For that reason, affiant does not undertake to discuss the various points of law raised by Mr. Buchman's affidavit.

NEWCOMB CONDEE,

Judge.

Subscribed and sworn to before me this 8th day of April, 1953.

I. W. WEITZEL,

Notary Public in and for said County and State.

APPENDIX C.

In the Superior Court of the State of California in and for the County of Los Angeles.

In the Matter of the Estate of Harry G. Buchman, also know as H. G. Buchman, Deceased. No. 321,766.

FINDINGS AND ORDER IN RE CLAIMED DISQUALIFICATION OF TRIAL JUDGE.

The clerk of the above entitled court having certified to the Chairman of the Judicial Council of the State of California that issue has been joined as to the alleged disqualification of Honorable Newcomb Condee to act in the cause, and that the attorneys for the respective parties therein having failed to agree upon a judge to determine the issue of disqualification so raised, and

Honorable Phil S. Gibson, Chairman of the Judicial Council of the State of California, having, on April 17, 1953, requested the undersigned, in accordance with the provisions of Section 170, Code of Civil Procedure, to hear and determine said issue;

NOW, THEREFORE, the undersigned, having read and considered the "OBJECTIONS OF HAMLIN K. BUCHMAN TO JUDGE NEWCOMB CONDEE HEARING PETITION FOR PARTIAL DISTRIBUTION, ETC.," of Morris Lavine, attorney for Objector, "AFFIDAVIT AND ANSWER OF JUDGE IN RESPONSE TO MOTION TO DISQUALIFY," it is the finding of the undersigned that Honorable Newcomb Condee

is not disqualified to determine any question, matter, fact or issue pending in such cause.

Dated: April 23, 1953.

PHILIP H. RICHARDS,
Presiding Judge of the Superior Court.

Orig.—County Clerk for filing
cc —Justice Phil S. Gibson,
Chairman, Judicial Council.
cc —Hon. Newcomb Condee
cc —Morris Lavine, Esq.